

Duane A. Admire, State Bar No. 173699  
ADMIRE & ASSOCIATES  
12880 Carmel Country Road, Suite D110  
San Diego, CA 92130  
Telephone: (619) 316-6658  
Facsimile: (858) 350-1046

James R. Patterson, State Bar No. 211102  
Allison H. Goddard, State Bar No. 211098  
Jacquelyn E. Quinn, State Bar No. 314616  
PATTERSON LAW GROUP APC  
1350 Columbia St., Suite 603  
San Diego, CA 92101  
Telephone: (619) 756-6990  
Facsimile: (619) 756-6991

Attorneys for Plaintiff CARLA JONES

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego  
**11/09/2017** at 08:00:00 AM  
Clerk of the Superior Court  
By Katelin O'Keefe, Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO – CENTRAL DIVISION

CARLA JONES, on behalf of themselves and all  
others similarly situated,

Plaintiffs,

vs.

SHARP HEALTHCARE, a California  
Corporation, SHARP GROSSMONT HOSPITAL,  
and DOES 1- 100, inclusive,

Defendants.

Case No. 37-2017-00001377-CU-NP-CTL

**[E-FILE]**

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT OR, IN THE ALTERNATIVE,  
MOTION FOR SUMMARY ADJUDICATION**

Hearing Date: December 1, 2017

Hearing Time: 8:30 a.m.

Dept.: 62

Judge: Hon. Ronald L. Styn

Action Filed: January 12, 2017

Trial Date: None Set

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	4
A.	Sharp’s Admission Agreement Does Not Provide Valid Consent to Secretly Record Patients .....	4
B.	Sharp’s Admission That the Videos Contain Private Information of Plaintiff and Other Patients.....	5
C.	Sharp’s Post Hoc Justification of “Patient Safety” .....	6
D.	The Missing Propofol Did Not Present a Genuine Risk to Patient Safety.....	8
III.	THE MOTION SHOULD BE DENIED.....	10
A.	The Admission Agreement Is Not Evidence of “Consent” .....	10
1.	The Admission Agreement Is an Adhesion Contract .....	11
2.	The “General Consent” Provision Is Unenforceable Because It Goes Beyond the Reasonable Expectations of an Ordinary Person.....	12
B.	There Are Triable Issues of Material Fact Regarding the Legitimacy of Sharp’s Post Hoc Justification of “Patient Safety” .....	14
C.	Sharp’s Use of Plaintiff Jones’ Recording Was Unlawful and There Is No Permissible Exception.....	16
D.	“Communication” for Purposes of Section 632 is Not Limited to Oral or Written Dialogue.....	18
E.	Plaintiff Has Stated a Viable Claim Under Civil Code Section 1708.85.....	19
IV.	CONCLUSION.....	21

## TABLE OF AUTHORITIES

### **Cases**

<i>Aguilar v. Atlantic Richfield Co.</i> , 25 Cal. 4th 826 (2001) .....	10
<i>Armendariz v. Foundation Health Psychcare Services, Inc.</i> (2000) 24 Cal.4 <sup>th</sup> 83, 113) .....	11
<i>Auto Equity Sales, Inc. v. Superior Court</i> (1962) 57 Cal.2d 450.....	19
<i>Bondanza v. Peninsula Hospital Medical Center</i> (1979) 23 Cal. 3d 260.....	11
<i>Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.</i> (2015) 232 Cal.App.4th 1332 .....	11
<i>Gray v. Zurich Insurance Co.</i> (1966) 65 Cal.2d 263 .....	11, 12
<i>Market Basket v. Jacobsen</i> (1955) 134 Cal.App.2d 73.....	17
<i>Neal v. State Farm Ins. Cos.</i> (1961) 188 Cal.App.2d 690 .....	11
<i>People v. Drennan</i> (2000) 84 Cal.App.4th 1349 .....	19
<i>People v. Gibbons</i> (1989) 215 Cal.App.3d 1204 .....	18, 19
<i>People v. Nakai</i> (2010) 183 Cal.App.4th 499 .....	18, 19
<i>Powers v. Dickson, Carlson &amp; Campillo</i> (1997) 63 Cal. App. 4th 1102.....	11
<i>Saelzler v. Advanced Group</i> , 25 Cal. 4th 763, 768 (2001) .....	10
<i>Schmidt v. Pacific Mut. Life Ins. Co.</i> (1969) 268 Cal.App.2d 735 .....	11
<i>Smith v. Westland Life Ins. Co.</i> , 15 Cal.3d 111 .....	12
<i>Steven v. Fidelity &amp; Casualty Co.</i> , 58 Cal.2d 862 .....	11, 12
<i>Tunkl v. Regents of University of California</i> (1963) 60 Cal.2d 92 .....	11
<i>Von Nothdurft v. Steck</i> (2014) 227 Cal.App.4th 524, 535.).....	11
<i>Wheeler v. St. Joseph Hospital</i> (1976) 63 Cal.App.3d 345 .....	11, 12

### **Other Authorities, Rules & Statutes**

45 C.F.R. Section 160 .....	16
Cal. Penal Code § 632.....	3, 18, 19
California Evidence Code section 994.....	5
CCP § 437c(o)(2).....	10
Civ. Code § 1708.85 .....	3
Civ. Code § 56.10(c)(14) .....	18

1	Civ. Code, § 56.101(a).....	16
2	Civ. Code, § 56.36(b).....	16
3	Civ. Code. § 56.10(c).....	17
4	Civ. Code. § 56.10(c)(3) .....	17
5	Civil Code § 56.....	5
6	Civil Code § 56.36 .....	16
7	Civil Code section 1708.85.....	19, 20

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **I. INTRODUCTION**

2 For nearly a year, Defendants Sharp Healthcare and Sharp Grossmont Hospital violated the most  
3 fundamental norms of patient privacy. Sharp installed hidden cameras in all three operating rooms of the  
4 Women’s Center at Sharp Grossmont Hospital and recorded female patients before, during, and after  
5 surgical procedures. The patients were undressed, unconscious, vulnerable, and had no expectation or  
6 indication that they were being recorded.

7 Sharp recorded the birth of Plaintiff Carla Jones’ first daughter by emergency cesarean section –  
8 one of the most emotional moments of her life – on these hidden cameras. Ms. Jones only learned of this  
9 years later through a news report. She was shocked and horrified at Sharp’s complete disregard for her  
10 privacy. She brought this case on behalf of herself and all other female patients who were subjected to  
11 Sharp’s secret recording.

12 Sharp now seeks to terminate Plaintiff’s case because it claims Plaintiff “consented” to the  
13 recording when she signed Sharp’s Admission Agreement, a form document that Sharp requires every  
14 patient to sign as a condition of admission. Sharp claims that a generic “General Consent” paragraph in  
15 the Admission Agreement allowed Sharp to install hidden cameras in operating rooms in the interest of  
16 “patient safety.” But the factual record demonstrates that Sharp’s own employees would not reasonably  
17 expect this form contract to allow secret recording of patients, and that Sharp’s reliance on the “patient  
18 safety” provision in the Admission Agreement is a post hoc attempt to find a justification for its  
19 outrageous breach of patient privacy.

20 Sharp’s motion fails on the law because Sharp applies an incorrect standard for consent. Sharp  
21 relies on general rules of contract interpretation to try to force the Admission Agreement to mean  
22 something it clearly does not. The Admission Agreement is a contract of adhesion, so the general rules of  
23 contract interpretation do not apply. The legal issue here is not whether a dictionary defines the meaning  
24 of the term “consent.” The legal issue is whether Plaintiff would have a reasonable expectation under the  
25 Admission Agreement that she was agreeing that Sharp could secretly videotape her, undressed and in  
26 distress, at one of the most intense moments of her life, and then allow that videotape to be watched by  
27 security employees. The Admission Agreement did not, and could not, create that expectation. Plaintiff  
28 did not consent, through the Admission Agreement or otherwise.

1 Sharp's motion also fails on the facts. There are material factual disputes regarding the issue of  
2 consent. Sophia Henderson, the Sharp employee who was responsible for presenting the Admission  
3 Agreement to Plaintiff and explaining it to her, testified that she had no idea Sharp was secretly recording  
4 patients, and had no expectation that Sharp would ever do so. If Plaintiff had asked her if the "General  
5 Consent" in the Admission Agreement would allow hidden cameras in the operating rooms,  
6 Ms. Henderson would have told Plaintiff it did not. Plaintiff also checked a box on the Admission  
7 Agreement refusing to allow Sharp to photograph her newborn daughter, further indicating that Plaintiff  
8 had no reasonable expectation that despite this instruction, Sharp would secretly videotape her, and her  
9 daughter, in the operating room, as it did.

10 There are material factual disputes regarding Sharp's claim that it was motivated to install the  
11 hidden cameras because of "patient safety" concerns regarding missing Propofol. The factual record  
12 demonstrates that Sharp was not concerned about Propofol when it installed the cameras. Sharp had  
13 eleven recordings of the same doctor entering unoccupied operating rooms and putting vials of drugs in  
14 his shirt pocket during periods of time when drugs went missing. Despite this, Sharp did not confront the  
15 doctor until April 2013, nine months after it installed the cameras, because it said the recordings were not  
16 enough evidence to confront the doctor. And so Sharp prioritized catching a thief over any patient safety  
17 concerns from continuing to allow Propofol and other drugs to go missing over several months. Sharp's  
18 former security employee candidly acknowledged that Sharp *wanted* the drugs to continue to go missing,  
19 so that it "could catch who the bad guy was." (PA at 068.)<sup>1</sup>

20 Sharp claims that it had no other choice but to install hidden cameras after conducting an  
21 "internal audit" of the missing drugs. But the only evidence of an "internal audit" is the attorney-drafted  
22 declaration of George Sweet submitted with Sharp's motion. In his deposition, Mr. Sweet testified  
23 repeatedly that he was not aware of any internal audit that Sharp did prior to installing the video cameras  
24 to determine where the Propofol went. (PA at 071, 082.) Several other Sharp employees testified  
25 consistently that they had no knowledge of an internal audit. In fact, there is no evidence that Sharp made  
26 any efforts to use less intrusive means to address the missing drugs.

27  
28 <sup>1</sup> For the Court's convenience, Plaintiff has created an Appendix of Exhibits referred to as "PA." Plaintiff  
will cite to specific pages of the Appendix for support throughout this brief.

1 It is undisputed that patient safety was *not* an issue when Plaintiff was secretly recorded on  
2 May 15, 2013. That was approximately six weeks after Sharp confronted the doctor seen in the  
3 recordings and initiated Medical Executive Committee proceedings regarding the missing drugs. Sharp's  
4 Director of Security admitted that there was no purpose to continue secretly recording patients after  
5 Sharp confronted Dr. Dorin:

6 Q. Once the investigation had identified Dr. Dorin as the person taking drugs, what  
7 was the purpose for any further recording through the cameras in the operating  
8 rooms?

9 A. None to me.

10 (PA at 170.)

11 There are material factual disputes as to what is shown on the video and whether it is actionable  
12 under the wiretapping law, Cal. Penal Code § 632, or the distribution of private sexually explicit material  
13 law, Civ. Code § 1708.85. Although the recording does not include audio, it does capture numerous  
14 communicative gestures between Plaintiff and her medical team, and Plaintiff and her husband. Sharp  
15 had no right to record these communications without Plaintiff's consent under Penal Code § 632. And  
16 even though Sharp tries to describe the video as merely showing Plaintiff entering and exiting the  
17 operating room, with a surgical tent covering the procedure, still shots from the video confirm that  
18 Plaintiff was recorded when she was naked below the breasts and being prepped for her surgery.

19 Defendants compounded the harm to Plaintiff and class members caused by the secret recordings  
20 when they disclosed those recordings to Howard LaBore, a member of Sharp's security staff, and others  
21 in the course of a Medical Board investigation. This disclosure does not fall within any of the exceptions  
22 enumerated in the Confidentiality of Medical Information Act ("CMIA"). Defendants disclosed  
23 Plaintiff's confidential medical information in order to build a case against an unpopular doctor, not for  
24 any of the valid exceptions set forth in section 56.10(c) of the CMIA.

25 Sharp has failed to meet its burden on this motion. Sharp relies on an incorrect standard for  
26 reviewing the Admission Agreement. And there are myriad factual disputes that are material to Plaintiff's  
27 claims. The motion should be denied.

1 **II. STATEMENT OF FACTS**

2 **A. Sharp's Admission Agreement Does Not Provide Valid Consent to Secretly Record**  
3 **Patients**

4 Plaintiff was admitted to Sharp Grossmont Hospital on May 15, 2013, for the birth of her first  
5 child. (PA at 277-78.) Plaintiff signed an Admission Agreement that Sharp required as a condition of her  
6 being treated at the hospital. (PA at 124-125, 255-56, 277-78.) The Admission Agreement is a "take-it-  
7 or-leave-it" contract. Patients cannot negotiate or change the terms, and if they refuse to sign the  
8 agreement, Sharp will refuse to admit them. (*Id.*)

9 The first paragraph of the Admission Agreement includes a "General Consent to Hospital  
10 Services:

11 **1. GENERAL CONSENT TO HOSPITAL SERVICES:** You consent to all hospital services rendered under the general  
12 and special instructions of your physician(s), and to the taking of photographs and videos of you for medical treatment,  
13 scientific, education, quality improvement, safety, identification or research purposes, at the discretion of the hospital and  
14 your caregivers and as permitted by law. In the event a healthcare worker is exposed to your blood or body fluid during your  
15 hospitalization, we may test a sample of your blood for diseases that might be communicable. Teaching programs for  
various healthcare disciplines are conducted through colleges, universities and high schools in some areas of this hospital.  
Students and residents of these programs may participate in your care.

16 (PA at 277.) A more specific provision in the Admission Agreement allows a patient to expressly  
17 provide, or deny, consent to have a newborn photographed by Sharp:

18 17. Initial here ☒ if not approved. **NEWBORN PHOTOGRAPHY:** The taking of pictures of my newborn child or  
19 children for possible purchase by me is approved.

20 Plaintiff denied consent by initialing above. (PA at 278.)

21 Sophia Henderson, the Sharp employee who witnessed Plaintiff's signature on the Admission  
22 Agreement, testified that Sharp had trained her on how to respond to patient questions about the  
23 Admission Agreement. (PA at 010.) Ms. Henderson had no idea before preparing for her deposition that  
24 Sharp ever used hidden cameras in its operating rooms. (PA at 011.) Ms. Henderson testified that if  
25 Plaintiff had asked her if the "General Consent" provision in the Admission Agreement included a  
26 consent to be videotaped by a hidden camera while undergoing surgery, she would have told Plaintiff no.  
27 (PA at 013-15.)  
28

1 After many hours of labor, Plaintiff's baby went into distress and Plaintiff's doctor determined  
2 she would need to perform an emergency delivery by cesarean section. (PA at 017-18, 020-21.)  
3 Plaintiff's husband was the only non-medical person present in the operating room. (PA at 020-21.) On  
4 May 15, 2013, shortly after 10:00 pm, Plaintiff gave birth to her daughter. (PA at 248-49.)

5 The video of Plaintiff's birth shows Plaintiff entering the operating room on a mobile hospital  
6 bed. (PA at 229.) It shows her having communications with the nurses in the operating room. (PA at 230-  
7 34.) It shows her naked from below the breasts while she is being prepped for surgery. (PA at 235-37.)

8 The video also shows incredibly private and intimate interactions between Plaintiff and her  
9 husband at a particularly vulnerable time, when Plaintiff was concerned about the health and well-being  
10 of her baby, who had been in distress. (PA at 238-47.) Plaintiff's husband is shown comforting her and  
11 reassuring her during the surgery. And, the video shows Plaintiff's daughter and the moment when  
12 Plaintiff first saw her. (PA at 248-49.)

13 The video also shows Plaintiff communicating with a nurse after the birth. (PA at 250-52.) It  
14 shows the nurse massaging Plaintiff's uterus following the birth to contract it, expel blood clots, and  
15 prevent postpartum hemorrhage. (*Id.*) It shows Plaintiff being wheeled out of the operating room after  
16 surgery. (PA at 253.)

17 **B. Sharp's Admission That the Videos Contain Private Information of Plaintiff and**  
18 **Other Patients**

19 Sharp secretly recorded approximately 1,806 patients undergoing surgical procedures between  
20 July 17, 2012 and June 25, 2013. (PA at 255.) These videos became a serious issue for Sharp when the  
21 Medical Board of California began an investigation of Dr. Dorin based on the missing drugs, at Sharp's  
22 urging, in 2015. Dr. Dorin subpoenaed Sharp, demanding production of all the videos in that proceeding  
23 so that he could search for exculpatory evidence, i.e., videos showing other doctors taking drugs from the  
24 operating room carts. Sharp moved to quash that subpoena. (PA at 257-271.)

25 In its motion to quash, Sharp argued that Dr. Dorin's subpoena "runs afoul of privacy interests of  
26 a multitude of persons, protected by among other things Article 1, Section 1 of the California  
27 Constitution, the California Medical Information Act (Civil Code § 56 *et seq.*, and specifically § 56.10),  
28 California Evidence Code section 994, the Fourth Amendment of the U.S. Constitution and/or the Health

1 Insurance Portability and Accountability Act (HIPAA).” (PA at 265.) Sharp also acknowledged in its  
2 Motion to Quash that “[p]atients have an objectively reasonable expectation that video reflecting them in  
3 their most vulnerable state, unconscious on an operating room table, will not be disclosed.” (PA at 266.)  
4 Sharp supported its Motion to Quash with a declaration from Carlisle Lewis, III, its Senior Vice  
5 President and General Counsel. (PA at 001.) Mr. Lewis testified in his declaration that the videos:

6 all capture scenes within the three operating rooms, which are not open to the public.  
7 There are images contained within the multitude of images of women undergoing  
8 operations of a very personal, private nature, unconscious and in states of exposure  
depending on the operation being performed.

9 (PA at 004-05.)

### 10 **C. Sharp’s Post Hoc Justification of “Patient Safety”**

11 Sharp now claims that it had no other choice but to install hidden cameras in the operating rooms  
12 to protect patient safety. This is, at best, a post hoc justification. Sharp knew that drugs had been missing  
13 from carts in the Women’s Center operating rooms for a few years before 2012. (PA at 094, 100, 196.)  
14 Sharp did nothing about the missing drugs until May 2012, when its operating room staff finally reported  
15 it to hospital security. (PA at 196.)

16 George Sweet, a Sharp security employee, was assigned to investigate the report of missing  
17 drugs. (PA at 060-61, 079, 196, 223-25.) Mr. Sweet’s initial report identified Dr. Adam Dorin as an  
18 anesthesiologist who was on duty and had access to the drugs when they went missing. (PA at 224-25.)  
19 Mr. Sweet’s report also notes that the Women’s Center staff told him that the missing drugs were “as if  
20 someone was stocking a surgery center,” and that Dr. Dorin and his wife operated a medical spa as a side  
21 business. (*Id.*) Despite this information, Sharp did not confront Dr. Dorin or ask him if he had  
22 information about the missing drugs before installing the cameras.

23 On or about July 17, 2012, Sharp installed and activated hidden cameras in the three operating  
24 rooms of the Women’s Center’s at Grossmont. (PA at 001-02.) There is no evidence in the record that  
25 Sharp made any serious attempt to take any less drastic measures to investigate the missing drugs  
26 between May 12, 2012, and July 17, 2012. Although Sharp submitted an attorney-drafted declaration  
27 signed by Mr. Sweet in support of its motion claiming that Sharp performed an “internal audit” to  
28 investigate the missing drugs before installing cameras, Mr. Sweet testified at deposition this was not

1 true:

2 Q. I suppose to answer this a better way: Did you do anything to try to determine,  
3 other than what we've discussed, looking at Dr. Dorin's website, but did you do  
4 anything to investigate the matter other than you guys started talking about let's  
5 install these video cameras, and I think you told the people not to announce it, you  
6 know, that was the discussion, that you wouldn't announce it because of what we  
7 had discussed, but other than the idea that, hey, let's install these secret video  
8 cameras from the time of May 2012 that you got your initial report and the time  
9 the cameras were installed, did you do any other investigation to try to determine  
10 who was stealing these drugs?

11 A. No.

12 (PA at 081-82.) The cameras were built into computer monitors in the operating rooms and faced areas  
13 where patients receive care. (PA at 001, 228.) They were motion-triggered, and would automatically start  
14 recording as soon as anyone moved in the room. (PA at 002.)

15 Sharp recorded eleven videos between September 14, 2012 and April 4, 2013, that appeared to  
16 show Dr. Dorin entering a dark, unoccupied operating room and putting vials of drugs in his shirt pocket.  
17 (PA at 197-98.) The dates of these videos were: September 14, 2012; December 11, 2012; December 16,  
18 2012; December 20, 2012; December 24, 2012; January 3, 2013; January 4, 2013; January 8, 2013;  
19 February 6, 2013; February 7, 2013; March 19, 2013; March 27, 2013; April 2, 2013; and April 3, 2013.  
20 (*Id.*) Despite this information, Sharp did not confront Dr. Dorin or ask him if he had any information  
21 about the missing drugs. (PA at 171, 177-78, 186-87.) Sharp understood that confronting Dr. Dorin  
22 would likely deter future thefts, but chose instead to focus on collecting video evidence against  
23 Dr. Dorin, even after its head of security realized that the videos were not enough because they could not  
24 tell precisely which drugs Dr. Dorin removed from the drug carts in the videos. (*Id.*) In fact, Sharp  
25 **wanted** the drugs to continue to go missing so it "could catch who the bad guy was." (PA at 068.)

26 Sharp finally confronted Dr. Dorin in early April, 2013. (PA at 139.) Sharp confronted him after  
27 the nursing staff reported that Dr. Dorin had been staggering while on duty. (PA at 182-83, 213-14.)  
28 Linda Hamel, Sharp's Women's Center Operating Room and Recovery Room Supervisor at the time,  
testified at deposition that this was the first date she knew of any concern by Sharp that Dr. Dorin might  
be abusing Propofol. (PA at 085-86, 103-04, 108, 109.) She testified that the fact that Propofol was  
missing was not a significant concern until then. (*Id.*)

1 After Sharp confronted Dr. Dorin in early April, 2013, it believed that it had identified Dr. Dorin  
2 as the cause of the missing drugs. (PA at 170.) Inexplicably, Sharp continued recording patients with the  
3 hidden cameras in the operating rooms even after this date. (*Id.*) Plaintiff's video was created on  
4 May 15, 2013, approximately 5 weeks after Sharp confronted Dr. Dorin.

5 **D. The Missing Propofol Did Not Present a Genuine Risk to Patient Safety**

6 Sharp submitted the declaration of Dr. Steven Yun as evidence that the missing Propofol  
7 presented a risk to patient safety. Dr. Yun's declaration, however, does not provide any admissible expert  
8 opinions to support Sharp's arguments.

9 Dr. Yun submitted a declaration that purports to opine that "Propofol illicitly obtained for  
10 purposes of abuse and addiction presents a very serious health risk to hospital patients, doctors, nurses,  
11 and the public at large." (Yun Decl. ¶ 10.) Dr. Yun has no basis for making this conclusion. The only  
12 information he received regarding this case was that a doctor was accused of stealing Propofol from a  
13 Sharp hospital. (PA at 026-27.) Although he learned later that other drugs were missing, he did not  
14 review any documents that listed the other missing drugs. (PA at 030-31.) He did not review Sharp's  
15 security report regarding the missing drugs, which identified the amount of each drug that was missing  
16 and at what periods in time. (*Id.*) He did no research regarding Propofol, other than to look for articles of  
17 which he was already aware. (PA at 036-37.)

18 At deposition, Dr. Yun admitted that he cannot state an opinion on whether missing Propofol is a  
19 threat to patient safety without knowing more than just "Propofol was missing."

20 Q. If something had been continuing for years with no effects on patient safety at  
21 their hospital, would that change your assumption of whether or not the patients at  
Sharp Hospital were in any danger?

22 A. Well, that's a very broad assumption. We don't know if patient safety was  
23 endangered because I don't have access to those records. We don't know, for  
24 example, which patients couldn't receive certain drugs and then suffered some  
25 sort of pulmonary distress or some sort of other anesthesia event. ***Without access  
to all the records and looking at all the data, I can't assume that patient safety  
was not endangered by this alleged activity.***

26 Q. ***So it's not – you can't tell one way or another whether patient safety was  
27 endangered because of this activity because you don't have the information?***

28 A. ***Correct.***

1 (PA at 032-33.) Dr. Yun’s declaration is not admissible expert opinion that supports or justifies Sharp’s  
2 breach of patients’ privacy. It is simply speculation.

3 Dr. Yun’s declaration, and the portions of Sharp’s Separate Statement that are based on it, are  
4 also replete with hyperbole and vague, unsupported assertions. Dr. Yun declares that Propofol is a  
5 “highly regulated drug.” (Yun Decl. ¶ 3.) What does that even mean? It is undisputed that Propofol is not  
6 a narcotic. (PA at 049.) Propofol is not a controlled substance. (*Id.*) Sharp stored it on unlocked drug  
7 carts, accessible to any employees with access to the operating rooms, and allowed it to go missing for  
8 years before alerting its security department. (PA at 089-90, 100.) Dr. Yun admitted at deposition that  
9 Propofol is difficult, if not impossible, for a physician to abuse while on duty because it induces sleep  
10 instantly. (PA at 042-43, 052.) Dr. Yun acknowledged that he is not aware of any incident where a  
11 patient was harmed because of a doctor or nurse’s abuse of Propofol. (PA at 038, 043.)

12 Perhaps the most striking aspect of Dr. Yun’s declaration is that Sharp had to look for an outside  
13 expert to support its argument that the missing Propofol posed such a significant safety risk to patients  
14 that it warranted Sharp’s complete disregard for their privacy. If that was truly a concern at the time the  
15 missing drugs were reported, one would expect to see some document – an email, a memo – reviewing  
16 which drugs were missing, how that might affect patient safety, and what Sharp could or must do to stop  
17 it. Instead, Sharp’s employees acknowledged that Propofol was not a concern at the outset of the  
18 investigation.

19 Q. Was there – at that point was there any issue that the drug, Propofol, was more  
20 problematic as possibly somebody could abuse that as opposed to any of the other  
21 drugs?

22 A. Quite frankly, they weren’t concerned about Propofol.

23 (PA at 062, 063, 074.) Linda Hamel, the Operating Room Supervisor, testified that she had no reason to  
24 believe that Propofol, or any of the missing drugs, posed a safety risk when she reported them missing.  
25 (PA at 103-04.) Patient safety did not become a concern until April 2013, when Dr. Dorin was seen  
26 stumbling down a hall, dropping a syringe. (PA at 103-04, 213-14.)

27 Sharp did not decide that Propofol posed such a safety risk that it had to install hidden cameras in  
28 its operating rooms until this case was filed and they had to come up with some excuse for their actions.

1 The factual record does not support Sharp's post hoc justification of patient safety based on missing  
2 Propofol.

3 **III. THE MOTION SHOULD BE DENIED**

4 California Code of Civil Procedure 437c allows a defendant to obtain summary judgment by  
5 showing that "one or more elements of the cause of action ... cannot be established, or that there is a  
6 complete defense to that cause of action." (*Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal. 4th 826, 849  
7 (quoting CCP § 437c(o)(2).) A defendant moving for summary judgment "bears an initial burden of  
8 production to make a prima facie showing of the nonexistence of any triable issue of material fact ... ." (*Aguilar*, 25 Cal. 4th at 850.) To meet this burden, a defendant must present admissible evidence that  
9 demonstrates that the plaintiff "does not possess, and cannot reasonably obtain, needed evidence" to  
10 prove his or her claim. (*Id.* at 855.) The court must view the evidence presented in a light favorable to the  
11 non-movant, "liberally construing [the non-movant's] evidentiary submission while strictly scrutinizing  
12 [the movant's] own showing, and resolving any evidentiary doubts or ambiguities in [the non-movant's]  
13 favor." (*Saelzler v. Advanced Group*, (2001) 25 Cal. 4th 763, 768.) If the defendant meets this initial  
14 burden, the burden then shifts to the plaintiff to present evidence of a triable issue of material fact. (*Id.* at  
15 850.)  
16

17 Sharp is not entitled to summary judgment. Its entire motion is hedged on the argument that  
18 Plaintiff's claims fail because she "consented" to being secretly recorded in the Admission Agreement.  
19 The Admission Agreement is not evidence of consent, however, because it is an adhesion contract, and  
20 Plaintiff would not have reasonably expected that by signing it, she was consenting to be secretly  
21 recorded during a cesarean section. And even if the Admission Agreement could be read to provide  
22 consent, there is a material factual dispute regarding Sharp's claim that missing Propofol created a  
23 patient safety risk that allowed it to secretly videotape Plaintiff under the terms of the Admission  
24 Agreement.

25 **A. The Admission Agreement Is Not Evidence of "Consent"**

26 The authorities relied on by Sharp in its motion recite general principles of contract interpretation.  
27 Those have no application here, because the Admission Agreement is a classic contract of adhesion, and  
28 Sharp's conduct in secretly videotaping Plaintiff's procedure went well beyond her reasonable

1 expectation of what was described in the “General Consent” provision of the Admission Agreement.

2 **1. The Admission Agreement Is an Adhesion Contract**

3 The term “adhesion contract” refers to a “standardized contract form offered to consumers of  
4 goods and services on essentially a ‘take it or leave it’ basis without affording the consumer a realistic  
5 opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or  
6 services except by acquiescing in the form contract.” (*See* Blacks Law Dictionary 318-319 (7th Ed.  
7 1999).) The California Supreme Court has defined the term to mean: (1) a standardized contract,  
8 (2) imposed and drafted by the party of superior bargaining strength, (3) that provides the subscribing  
9 party only the opportunity to adhere to the contract or reject it. *Grand Prospect Partners, L.P. v. Ross*  
10 *Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1350 (*citing Armendariz v. Foundation Health*  
11 *Psychcare Services, Inc.* (2000) 24 Cal.4<sup>th</sup> 83, 113); *Von Nothdurft v. Steck* (2014) 227 Cal.App.4th 524,  
12 535.) The distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to  
13 its terms. (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 356; *see* Kessler, *Contracts of*  
14 *Adhesion, Some Thoughts About Freedom of Contracts*, 43 Colum.L.Rev. 629, 632; Slawson, *Mass*  
15 *Contracts: Lawful Fraud in California*, 48 So.Cal.L.Rev. 1, 47.)

16 Hospital admission agreements are widely recognized to be contracts of adhesion. (*See*  
17 *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101-102; *Wheeler v. St. Joseph*  
18 *Hospital* (1976) 63 Cal.App.3d 345, 357; *Bondanza v. Peninsula Hospital Medical Center* (1979) 23 Cal.  
19 3d 260, 267 (finding hospital admission agreement was an adhesion contract which a patient must sign as  
20 a condition of admission to the hospital); *Powers v. Dickson, Carlson & Campillo* (1997) 63 Cal. App.  
21 4th 1102, 1110 (the Court recognized that a “hospital admissions form constitutes an adhesion contract  
22 because a patient being admitted to a hospital is in no position to debate his or her terms of admission.”).)  
23 Contracts of adhesion must be interpreted and enforced differently from ordinary contracts. (*See* *Neal v.*  
24 *State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690; *Steven v. Fidelity & Casualty Co.*, 58 Cal.2d 862;  
25 *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92; *Gray v. Zurich Insurance Co.* (1966)  
26 65 Cal.2d 263; *Schmidt v. Pacific Mut. Life Ins. Co.* (1969) 268 Cal.App.2d 735.

27 Sharp’s Admission Agreement form is a pre-printed, standardized form drafted by Defendants,  
28 and presented to Plaintiff, and every other inpatient and outpatient of the hospital, as part of its

1 “admissions packet.” (PA at 124-125, 255-56, 277-78.) Plaintiff was required to sign the admission form  
2 in order to be admitted to the hospital. (*Id.*) Plaintiff was not able to negotiate or change the terms of the  
3 admission agreement. (*Id.*) When Plaintiff was required to sign the admission agreement she was at the  
4 hospital, at the direction of her doctor, in order to induce labor of her first child. (PA at 017-18.) Plaintiff  
5 was certainly the weaker party, and had no real choice but to seek admission to the hospital and sign the  
6 printed forms necessary to gain admission. Defendants’ Admission Agreement is a contract of adhesion;  
7 thus, the Court must determine its enforceability under stricter level of scrutiny.

8  
9 **2. The “General Consent” Provision Is Unenforceable Because It Goes Beyond  
the Reasonable Expectations of an Ordinary Person**

10 After a determination that a contract is one of adhesion, the Court must next determine the  
11 enforceability of its terms. (*Wheeler*, 63 Cal. App. 3d at 357.) In a contract of adhesion, “enforceability  
12 depends upon whether the terms of which the adherent were unaware are beyond the reasonable  
13 expectations of an ordinary person...” (*Id.*) The court must determine “what the weaker contracting party  
14 could legitimately expect . . . and to what extent the stronger party disappointed reasonable expectations  
15 based on the typical life situation.” (*Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 270, *quoting Kessler*,  
16 *Contracts of Adhesion* 43 Colum.L.Rev. 629, 637.) Courts will not enforce provisions in adhesion  
17 contracts that operate to defeat the reasonable expectations of the weaker party.

18 Conspicuousness and clarity of language alone are not enough to make the term in question  
19 enforceable. If a contractual provision would defeat the expectation of the weaker party, it may also be  
20 necessary to call her attention to the language of the provision. (*Smith v. Westland Life Ins. Co.*, 15  
21 Cal.3d 111, 122-123.) And if the language of such provision is too complicated or subtle for an ordinary  
22 layperson to understand, she should also be given a reasonable explanation of its implications. (*See Gray*  
23 *v. Zurich Insurance Co.*, 65 Cal.2d 263, 270-271; *Steven v. Fidelity & Casualty Co.*, 58 Cal.2d 862, 870-  
24 872.)

25 Although the “General Consent” in the Admission Agreement stated that a patient “consent[s]  
26 to...the taking of photographs and videos of [her] for...safety purpose,” no reasonable person would  
27 have ever read that language to mean what Sharp now suggests: consent to allow hidden cameras in the  
28 operating room during medical procedures. Plaintiff never believed she was authorizing the hospital to

1 secretly record her while she underwent a cesarean section. (PA at 019.) Sophia Henderson, the  
2 employee whom Sharp trained specifically on how to answer and address patients' questions regarding  
3 the Admission Agreement, never contemplated that it would include consent to have secret video  
4 cameras in the operating rooms. (PA at 013-14, 015.) Ms. Henderson testified that had Plaintiff asked  
5 whether the Admission Agreement authorized Sharp to secretly record her while she was in the operating  
6 room undergoing a procedure with her doctor she would have responded, *no*. (*Id.*)

7 Other provisions of the Admission Agreement demonstrate that a reasonable person would not  
8 read the General Consent provision to allow hidden cameras in an operating room. Paragraph 5 refers to  
9 a list of Patient Rights that are entirely inconsistent with the notion that Sharp could secretly videotape  
10 patients. (PA at 277.) "Sharp HealthCare Patients' Rights" policy states that patients have the right to:

11 Full consideration of privacy concerning the medical care program. Case discussion,  
12 consultation, examination and treatment are confidential and should be conducted  
13 discreetly. You have the right to be advised as to the reason for the presence of any  
individual.

14 (PA at 273.) Sharp acknowledges that if a security employee had been present in the operating room  
15 during Plaintiff's cesarean section, she would have had the right to request that he leave immediately.  
16 (PA at 126.) But allowing a security employee to view a secret recording of Plaintiff's surgery is even  
17 worse than allowing them to be physically present. When a procedure is recorded secretly, the patient has  
18 no idea, and no way to control how many people might obtain access and view the video.

19 Similarly, the Admission Agreement includes specific requests for consent that are inconsistent  
20 with the notion that the General Consent provision encompasses the broad scope advanced by Sharp.  
21 Paragraph 15 gives patients the option to opt out of being listed in the hospital directory. (PA at 278.)  
22 Paragraph 17 gives patients the option to deny consent to photograph their newborns. (*Id.*) Given these  
23 provisions, a reasonable person reviewing the Agreement would expect that they would be specifically  
24 asked for consent before Sharp videotaped their surgical procedure.

25 Under Sharp's overly broad and unreasonable reading of the General Consent in the Admission  
26 Agreement, patients have no right to privacy. Sharp could install hidden cameras at any place in the  
27 hospital at its sole discretion for all sorts of reasons, including education, quality improvement, or  
28 research. Sharp essentially claims there is no limit to its authority to secretly record its patients. To be

1 consistent with Sharp's interpretation, the "General Consent" paragraph would have to read: "You agree  
2 that you have no right to privacy while you are a patient of Sharp." But that is not what the agreement  
3 disclosed, and Sharp cannot rewrite it now to match its egregious conduct.

4 A reasonable person would never have expected that she was consenting to have secret cameras  
5 recording her surgical procedures in a private hospital operating room. The "General Consent" provision  
6 in the Admission Agreement does not create a reasonable expectation that patients essentially surrender  
7 all rights to privacy in exchange for admission. Sharp cannot obtain summary judgment by arguing that  
8 Plaintiff consented to its outrageous conduct.

9  
10 **B. There Are Triable Issues of Material Fact Regarding the Legitimacy of Sharp's Post  
Hoc Justification of "Patient Safety"**

11 Even if the Court finds that Plaintiff provided consent, the motion should be denied. There are  
12 material factual disputes regarding Sharp's post hoc justification of "patient safety." These disputes  
13 include:

14 *Whether missing Propofol was a safety concern of Sharp's when it installed the cameras.*  
15 Although Sharp now claims it was, there are many facts that refute this claim. Sharp knew drugs were  
16 missing for years before alerting security. (PA at 094, 100, 196.) Sharp kept Propofol on an unlocked  
17 drug cart accessible to multiple employees, even after it went missing. (PA at 089-90, 91.) Sharp's  
18 employees testified that Propofol was not a concern when the cameras were installed, and did not become  
19 a concern until many months later, in April 2013. (PA at 062, 063, 074, 103-04, 213-14.) Only four  
20 single dosage vials of Propofol were reported missing between May 2012 and September 2012. (PA at  
21 101-02, 109, 194.)

22 *Whether potential abuse of Propofol by employees was a safety concern of Sharp's when it*  
23 *installed the cameras.* Although Sharp now claims that it was, there are many facts that refute this claim.  
24 Dr. Yun testified that Propofol abuse by medical professionals is uncommon. (PA at 041.) Dr. Yun  
25 testified that it would be very difficult for a medical provider to abuse Propofol while on duty in a way  
26 that would endanger patients. (PA at 042-43, 052.) Sharp's employees testified that there was no concern  
27 about physician abuse of Propofol until Dr. Dorin was seen exhibiting strange behavior in April 2013.  
28 (PA at 062, 063, 074, 103-04, 213-14.) Sharp did not confront Dr. Dorin after obtaining multiple videos

1 of him – in September 2012, December 2012, January 2013, February 2013, or March 2013 – removing  
2 vials of drugs from dark operating rooms. (PA at 171, 177-78, 186-87, 197-98.) Sharp admitted that it  
3 *wanted* the drugs to continue to go missing so that it “could catch who the bad guy was.” (PA at 068.)

4 *Whether Sharp had any concerns about patient safety when it continued recording with the*  
5 *hidden cameras after it identified Dr. Dorin as the person responsible for the missing Propofol.*

6 Sharp’s motion does not address this issue, opting instead to remain vague about the date it identified  
7 Dr. Dorin and when it removed the cameras. But Sharp’s head of security acknowledged there was no  
8 reason to continue recording after this point. (PA at 170.)

9 The evidence that Sharp has put forward to justify its actions amounts to nothing more than  
10 hyperbole, speculation and falsehoods. The Yun Declaration purports to describe Propofol as a “highly  
11 regulated” drug, but Sharp kept it on an unlocked cart accessible to multiple employees, even after vials  
12 of Propofol were reported missing. (PA at 089-90, 100.) Dr. Yun declared that illicitly obtained Propofol  
13 poses a very serious risk, but he admitted at deposition that it was possible that the missing drugs were  
14 not stolen, but had not been accounted for property. (PA at 045.) Dr. Yun also admitted that he could not  
15 opine whether missing Propofol would endanger patient safety without more facts than Sharp ever gave  
16 him. (Yun Dep.) Dr. Yun admitted that it would be very difficult for a medical provider to abuse  
17 Propofol while on duty in a way that would endanger patients, because it is so fast-acting. (PA at 032-  
18 33.)

19 Sharp’s “undisputed fact” that it conducted an “internal audit,” as claimed in George Sweet’s  
20 declaration, is directly contradicted by Mr. Sweet’s sworn deposition testimony. (PA at 071, 082.) And  
21 Sharp’s employees – Mr. Sweet and Ms. Hamel – testified that Propofol was not an initial concern in the  
22 investigation, and did not become a concern until many months after the hidden cameras began recording  
23 patients. (PA at 062, 063, 074, 103-04, 213-14.)

24 Plaintiff anticipates Sharp will argue that they did not confront Dr. Dorin prior to March 2013  
25 because they did not have enough definitive evidence that he was taking Propofol, because they could not  
26 see the labels on the drugs he was putting in his pocket in the videos. This argument fails to support  
27 Sharp’s argument that the cameras were for “safety purposes” for multiple reasons. First, regardless of  
28 seeing the type of drug, Sharp had evidence that Dr. Dorin was removing some sort of drug from the drug

1 cart, when there was not a scheduled operation. If missing drugs posed such a serious risk to patient  
2 safety as Sharp argues, it could have put a stop to that risk as soon as it saw Dr. Dorin removing vials and  
3 syringes from the drug carts and placing them in his pockets. Instead, it chose not only to keep on  
4 recording; but to allow “patient safety” to be at risk because there was no purpose to secretly recording  
5 unless drugs were going missing. Second, if Sharp could not effectively confront Dr. Dorin based on the  
6 videos they had at that time, there is no way the cameras would ever provide the detailed evidence Sharp  
7 claimed it needed. (PA at 171, 177-78, 184-85, 186-87.) By that logic, Sharp should have shut down the  
8 cameras, and fashioned another approach to get the evidence it deemed necessary to end the “patient  
9 safety” risk.

10 Sharp was more concerned with catching a doctor in the act of stealing than the fact that drugs  
11 were missing. (PA at 157.) If missing drugs truly affected patient safety, the only reasonable conclusion  
12 is that Sharp would have opted for deterrence over detective work. Sharp’s head of security admitted that  
13 it likely could have deterred future theft by either announcing that they would be surveilling the drug  
14 carts, or simply letting the staff know an investigation was ongoing. (PA at 169, 177-78.) There are  
15 myriad factual disputes over Sharp’s post hoc justification of “patient safety” that preclude summary  
16 judgment.

17 **C. Sharp’s Use of Plaintiff Jones’ Recording Was Unlawful and There Is No**  
18 **Permissible Exception**

19 The Confidentiality of Medical Information Act (“CMIA”) makes “any provider of health care,  
20 health care service plan, pharmaceutical company, or contractor who negligently creates, maintains,  
21 preserves, stores, abandons, destroys, or disposes of medical information” liable under Civil  
22 Code § 56.36. (Civ. Code, § 56.101(a); *see also* Civ. Code, § 56.36(b) (holding liable a health care  
23 provider who “negligently release[s] confidential information or records” concerning a patient.

24 The CMIA regulates the use and disclosure of medical information. (Cal. Civ. Code §§ 56-56.37.)  
25 While CMIA does not specifically define “use” or “disclosure” HIPAA defines each. “Use means, with  
26 respect to individually identifiable health information, the sharing, employment, application, utilization,  
27 examination, or analysis of such information within an entity that maintains such information.” *See* 45  
28 C.F.R. Section 160.103. “Disclosure means the release, transfer, provision of access to, or divulging in

any manner of information outside the entity holding the information.” *Id.*

Here, Sharp made an unlawful *use* of Plaintiff’s confidential medical information without her authorization, when they permitted Howard LaBore to view the video of her undergoing a cesarean section. Sharp did not “disclose” the video to Mr. LaBore, as he examined the video as an internal employee of Sharp. Civil Code section 56.10(c) enumerates a variety of circumstances where *disclosure* of confidential medical information is permitted. Each exception contemplates a situation where a provider of health care would release or transfer medical information outside of the entity holding the information. As such, the exceptions under Civ. Code. § 56.10(c), which Sharp argues permits it to have made such a “use” of the video, do not apply.

Even if the enumerated exceptions in section 56.10(c) were to apply to Sharp’s unauthorized use of Plaintiff’s medical information, however, its motion would still fail because there remain factual disputes. Section 56.10(c)(3) authorizes disclosure of Plaintiff’s medical information to “a person or entity that provides billing, claims management, medical data processing, or other administrative services. . .” *See* Civ. Code. § 56.10(c)(3). Sharp argues that its disclosure of Plaintiff’s video recording to Howard LaBore was permissible because it was an authorized disclosure of confidential medical information for “administrative” services as contemplated by Civ. Code. § 56.10(c)(3).

Sharp argues *ejusdem generis* is invoked, and by looking to the terms “billing,” “claims management,” and “medical data processing” to construe the meaning and limitations of “other administrative services” the court should find that the unauthorized use of Plaintiff’s secretly recorded video of her undergoing a surgical procedure is permitted as an “other administrative service.” Under the doctrine of *ejusdem generis*, general words that follow specific words in a statute are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (*Market Basket v. Jacobsen* (1955) 134 Cal.App.2d 73, 82.) In other words, the Court should use the specific subjects or categories explicitly set forth in the statute to determine what other subjects or categories the legislature intended to include.

Sharp argues that the common thread between “billing,” “claims management,” and “medical data processing” is that they arise out of and are necessary for medical care, but are not technically an aspect of medical care and, therefore, other services required in a hospital setting but not necessarily an

1 aspect of medical care should be included in this expectation. By this logic, the release of confidential  
2 medical information for purposes of hospital maintenance, facilities, janitorial services, parking, and  
3 culinary services would also be included in the section 56.10(c)(3) expectation. This is nonsensical and in  
4 direct contradiction with the intent of the CMIA, which is to protect patients' confidential medical  
5 information.

6 The common thread among these three specific subjects is that they arise out of clerical patient  
7 processing and billing. An example of "other administrative services" as related to "billing," "claims  
8 management," and "medical data processing," would be the release of confidential patient information for  
9 purposes of insurance processing or photocopying medical records. Not the release of a secretly recorded  
10 video for purposes of catching a doctor removing drugs from a drug cart.

11 Sharp's allowing Mr. LaBore to review the recordings was also not permitted under the "catch-  
12 all" exception of Civ. Code § 56.10(c)(14). The CMIA authorizes medical care providers to disclose  
13 medical information "when the disclosure is otherwise specifically authorized by law, such as the  
14 voluntary reporting, either directly or indirectly, to the federal Food and Drug Administration of adverse  
15 events related to drug products or medical device problems." Civ. Code § 56.10(c)(14). Mr. LaBore was  
16 allowed to review Plaintiff's video after any purported "patient safety" issue had been confronted,  
17 addressed and dealt with. There was no longer any alleged need for Sharp to permit Mr. LaBore to  
18 review the recordings.

19 **D. "Communication" for Purposes of Section 632 is Not Limited to Oral or Written**  
20 **Dialogue**

21 Section 632, subdivision (a), provides that it is unlawful to "intentionally and without the consent  
22 of all parties to a confidential communication, by means of any electronic amplifying or recording  
23 device, eavesdrop[] upon or record[] the confidential communication . . . ." The Fourth District Court of  
24 Appeal of California has consistently held that "communication," for purposes of section 632, includes  
25 conduct, i.e., the definition is not limited to oral or written dialogues. (*People v. Nakai* (2010) 183  
26 Cal.App.4th 499, 517 (finding that intimate pictures qualify as "communication," within the meaning  
27 of section 632); *People v. Gibbons* (1989) 215 Cal.App.3d 1204, 1209 (held that a nonconsensual  
28 recording, without audio, of the "most intimate and private form of communication" (sexual intercourse)

1 surely violated the statute because “communication” refers more broadly to the exchange of thoughts,  
2 messages or information.)

3 Sharp relies solely on *People v. Drennan* (2000) 84 Cal.App.4th 1349, a decision from the Third  
4 District Court of Appeal, to argue that section 632(a) only applies to audible or symbol-based  
5 communications. Sharp does not address or attempt to distinguish *Nakai* or *Gibbons*. But clearly, the  
6 legal issue is not as clear-cut as Sharp presents it. To the extent there is conflict between the conflicting  
7 authority from the Third and Fourth District Courts of Appeal, this Court has discretion to choose  
8 between the conflicting decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)  
9 The Court here should follow the Fourth District Court of Appeal.

10 The Legislature’s express intent in enacting section 632 was to protect the right of privacy of the  
11 people of California. (Pen. Code, § 630.) A finding that “communication” as used in the privacy statute is  
12 not limited to conversations or oral communications, but rather encompasses any form of communication  
13 that a party intends to be confined to the parties thereto is the only interpretation consistent with  
14 Legislature’s express declaration of intent in enacting the statute. (*See* Pen. Code, § 630; *see also*  
15 *Gibbons*, 215 Cal.App.3d at 1209.) If the statute covers eavesdropping on or recording of a telephone  
16 call, it surely covers the nonconsensual recording of a doctor or nurse communicating with their patient  
17 (PA at 230-34), a husband providing support to his wife during surgery (PA at 238-47), and a mother  
18 seeing her child for the first time (PA at 248-49). Each and every one of these interactions are  
19 “communications” for purposes for section 632. They are the visible exchanges of love, support, fear,  
20 relief, and rejoice, and it was wrong for Sharp to secretly record them without Plaintiff’s consent.

21 **E. Plaintiff Has Stated a Viable Claim Under Civil Code Section 1708.85**

22 Civil Code section 1708.85 prohibits the unauthorized, intentional distribution of photographs or  
23 recordings of “intimate body parts.” Sharp argues that Plaintiff’s claim under section 1708.85 because  
24 the video of her cesarean section does not show “intimate body parts,” and Sharp cannot be liable under  
25 section 1708.85 because it is a business entity, not an individual. Neither argument has merit.

26 The video of Plaintiffs shows much more than her just entering and exiting Operating Room 1, as  
27 Defendants would like this Court to believe. The video shows her entering the operating room in a  
28 surgical gown. (PA at 229.) The video shows Plaintiff being prepped to give birth by way of a cesarean

1 section, which requires her surgical gown to be moved up her body, and tucked just under her breasts.  
2 (PA at 235-37.) Her bare stomach, pelvic area, and upper thighs are exposed and visible for nearly four  
3 minutes in the video. (*Id.*) This should be more than sufficient to state a claim under Civil Code  
4 section 1708.85.<sup>2</sup>

5 If the Court finds that the video of Plaintiff is not sufficient to support a claim under  
6 section 1708.85, it should allow Plaintiff additional discovery to identify a different class representative  
7 for this claim. Sharp has admitted under oath that the other videos that secretly recorded contain “images  
8 of women undergoing operations of a very personal, private nature, unconscious, and in states of  
9 exposure depending on the operation being performed.” (PA at 004-05.) Sharp’s security employee  
10 reviewed every video and testified to their content at deposition:

11 On some of the videos I could see the backsides, buttocks area as they’re getting onto the  
12 table briefly. I could see the backside sometimes on a video where the anesthesia may be  
given an injection into the back.

13 (PA at 146.) By Sharp’s own admission, the videos contain images of intimate body parts that are  
14 protected under section 1708.85.

15 Sharp’s argument that corporations or business entities cannot be liable under section 1708.85 has  
16 no merit. The intent of the statute was to prevent unauthorized, intentional distribution of photographs or  
17 recordings of intimate body parts. It defies logic that the Legislature would seek to address only conduct  
18 of individuals, but not of business entities, in enacting this protection. A person can be harmed just as  
19 significantly by a business entity’s unauthorized distribution of private images (and perhaps even more  
20 so) than one individual’s.

21  
22  
23 ///

24 ///

25 ///

26  
27  
28 <sup>2</sup> If the Court finds that the video of Plaintiff is not sufficient to support a claim under section 1708.85, it  
should allow Plaintiff additional discovery to identify a different class representative for this claim. Sharp  
has admitted under oath that the other videos that it took contain

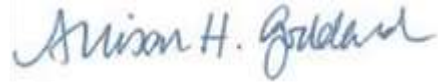
1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the motion be denied.

3  
4 Dated: November 8, 2017

ADMIRE & ASSOCIATES

5 PATTERSON LAW GROUP

6 

7 By: \_\_\_\_\_

8  
9 James R. Patterson, State Bar No. 211102  
Allison H. Goddard, State Bar No. 211098  
10 Jacquelyn E. Quinn, State Bar No. 314616  
1350 Columbia Street, Suite 603  
11 San Diego, CA 92101  
Telephone: (619) 756-6990  
12 Facsimile: (619) 756-6991

13  
14 Attorneys for Plaintiff CARLA JONES